No. 18-6210

In The Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF THE NATIONAL COLLEGE FOR DUI DEFENSE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DONALD J. RAMSELL*
Counsel for National College for DUI Defense Inc.
RAMSELL & ASSOCIATES LLC
128 S. County Farm Road
Wheaton, IL 60187
(630) 665-8780
Donald.Ramsell@dialdui.com

MICHELLE BEHAN
Counsel for National College for DUI Defense Inc.
BEHAN RAMSELL PLLC
945 N. Stone Avenue
Tucson, AZ 85718
(520) 220-5047
Michelle.Behan@MissDUIArizona.com

FLEMING KANAN WHITED, III
WHITED LAW FIRM
150 S. Palmetto Avenue
Suite 102
Daytona Beach, FL 32114
(386) 253-7865
fkwiii@aol.com

ANDREW MISHLOVE
MISHLOVE & STUCKERT
4425 N. Port Washington Road, #110
Milwaukee, WI 53212
(414) 332-3499
Andrew@MishloveandStuckert.com

*Counsel of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF AMICUS CURIAE[1]

Amicus curiae is the National College for DUI Defense ("NCDD").

NCDD is a nonprofit professional organization of lawyers, with over 1,400 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding breath, blood, and urine tests for alcohol and other drugs. NCDD has appeared as amicus curiae in several drunk driving cases before the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In this brief, Amicus makes three arguments.

First, that categorical exceptions to the Fourth Amendment warrant requirement are disfavored and should be avoided. This includes legislatively deemed consent to a search of any kind.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than Amicus and their counsel made a monetary contribution to the preparation or submission of this brief.

Second, that modern electronic warrant procedures are legal, efficient, and effective and should be encouraged. The addition of a new categorical exception to the warrant requirement is therefore unnecessary.

Third, two hundred years of precedent establishes that a state legislature does not have the power to pass a law that declares certain facts to be true such that they would operate to negate a person's individual rights arising under the U.S. Constitution. No just basis exists to depart from settled precedent in this matter.

For these reasons, this Court should reverse the decision of the Wisconsin Supreme Court

ARGUMENT

I. Categorical Exceptions To The Fourth Amendment Warrant Requirement Are Disfavored And Should Be Avoided. Per Se Exceptions Run Afoul Of The Basic Premise That Any Such Exception Should Be Based On An Individual Review Of The Totality Of Circumstances. Legislative "Deemed" Consent Is Contrary To Established Fourth Amendment Precedent.

Taking a blood sample or administering a breath test is a search governed by the Fourth Amendment. See Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616-17, 109 S.Ct. 1402, 103 L.Ed.2d 639

(1989); Schmerber v. California, supra. Thus, in the absence of an exception, a warrant is required in order to conduct such a search.

A blood draw is a particularly intrusive search. It invades the interior of the human body and, therefore, implicates interests in human dignity and privacy. Schmerber v. California, 384 U.S. 757, 769-70 (1966). To allow a blood draw without a warrant runs counter to these significant interests and established Fourth Amendment precedent.

A number of recognized, well-delineated exceptions to the warrant requirement may, in specific circumstances, apply to a warrantless search in a DUI case. For example, in a case involving a breath test, the search incident to a lawful arrest exception applies categorically. Birchfield v. North Dakota, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). For warrantless blood draws, an exigency exception may or may not apply, on a case-by-case basis. Missouri v. McNeely, 569 U.S. 141, 183, n. 3, 133 S.Ct. 1552, 1559, n. 3, 185 L.Ed.2d 696 (2013). Pp. 2173-74.

The Wisconsin statutes at question here categorically allow the warrantless search and seizure of blood from an unconscious subject, effectively creating a statutory exception to the Fourth Amendment. Amicus will address the related questions of whether categorical statutory exceptions to the Fourth Amendment are permissible, and the potential consequences that may result therefrom.

a. A State Cannot Legislatively Mandate The Waiver Of A Person's Constitutional Rights In Favor Of The State.

Both the concurring opinion and the dissenting opinions below (thus, a majority of the state Justices) correctly point out that Wis. Stat. § 343.305(3)(b) creates a statutory exception to the Fourth Amendment. "Deemed" or implied consent is not actual consent; a statute that classifies a category of ubiquitous behavior such as driving as "deeming" a waiver of a fundamental constitutional right is, at best, problematic.

The lead opinion justifies the "deemed" waiver on the basis of consent. It justifies the doctrine of "deemed" waiver by reference to administrative searches of pervasively regulated areas, per Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). This justification, however, does not fit. As Justice Kelly stated, the lead opinion misunderstood the nature of administrative searches under Colonnade. Administrative searches are not based on consent and the presence of pervasive governmental regulation. Rather, administrative searches under Colonnade are based on the idea that such searches do not intrude on the affected person's reasonable expectation of privacy. Thus, restauranteurs have no reasonable expectation to be free from health inspections. Although driving a car is a highly regulated area, drivers still maintain a reasonable expectation of privacy in their persons; as such, the administrative search exception does not apply.

The second justification is the idea that the driver has consented, albeit impliedly as demonstrated by the mere act of driving. Implied or "deemed" consent is a legal fiction, and is not actual consent. There is no precedent that would allow a state to categorically label such ubiquitous activity as driving as an implied waiver of Fourth Amendment rights. To do so would be a radical departure from all Fourth Amendment jurisprudence. The concurrence and dissent agree that a state cannot legislatively waive the people's constitutional protections in favor of the state. Again, as Justice Kelly aptly stated in his concurrence in State v. Brar, 898 N.W.2d 499 (Wis. 2017): "It is a metaphysical impossibility for a driver to freely and voluntarily give consent implied by law. This is necessarily so because 'consent' implied by law isn't given by the driver."

The lead opinion wrongly conflates three concepts: express consent, consent implied by conduct, and consent deemed by law. Express consent is, of course, nonproblematic, provided it is voluntarily and intelligently given. Consent by conduct is determined on a case-by-case basis, and is essentially non-verbal, but nevertheless remains express consent.

Consent implied by law, however, or waiver of a constitutional right as dictated by law, cannot actually be voluntary, as the consent is not given by the subject. Rather, it is a legal fiction that is premised upon the subject driving a car, rather than an actual exchange between the police officer and the citizen. Rather, the lead opinion below permits the state to bypass the well-established and constitutionally required

consideration of a totality of circumstances review when evaluating the subject's waiver of rights. The Wisconsin implied consent statute attempts to create a per se exception to the warrant requirement. Such categorical consent is, by definition, not individualized.

In McNeely, the Court declared that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. 141, 156 (2013). A case-by-case determination, rather than a categorical exception is required.

"But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its amici. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."

McNeely, supra, 569 U.S. at 152, 133 S.Ct. at 1561.

The Court implied such an application of McNeely in Aviles v. Texas, 571 U.S. 1119 (2014). In Aviles, the Court vacated a Texas judgment based on implied consent derived through the Texas implied consent law. 571 U.S. 1119 (2014). The Court remanded Aviles for further consideration in light of McNeely. McNeely, Birchfield, and Aviles all support the proposition that reliance on an implied consent statute to provide "actual" consent to a Fourth Amendment search violates McNeely's requirement that each blood draw in a

drunk driving case be analyzed on a case-by-case basis. Statutorily "deemed" consent is a particularly pernicious doctrine that has never been held by this Court to replace actual consent.

It must then be asked if consent is "deemed" in the case of every driver who has been arrested for DUI, what need is there for a warrant in any case? What becomes of the holding of McNeely requiring warrants except in exigent circumstances? Why should any legislature allow a subject the option to withdraw the implied consent?

Since statutory "implied consent" schemes are misnomers, these are not difficult questions to answer. The legal fiction of implied consent providing actual consent is misconstrued. These statutes are better characterized as administrative sanctions rather than implied consent. In other words, a state may permissibly impose a civil penalty structure for refusal to submit to a blood draw, but they cannot statutorily mandate a waiver of the right to refuse to consent to the blood draw.

b. The "Deemed" Consent Doctrine, As An Exception To The Warrant Requirement, Is Particularly Conducive To State Abuse, As It Invites Extension Into Other Areas, And Lacks Any Internal Limiting Concept.

If driving a car provides consent for a search of one's body, the question then necessarily becomes what

other similarly ubiquitous behavior may be deemed to constitute consent to a search? The implied consent doctrine, as so interpreted, is inherently problematic, because, as Justice Kelly again pointed out, it lacks any internal limiting concept:

> Nor is there anything about this new doctrine that necessarily limits it to the context of obtaining blood tests from intoxicated drivers. There are certain parts of the State that experience a disproportionate amount of crime. Perhaps the legislature might decide (that the) police need greater access to homes and other buildings in the area. It could, according to our opinion today, adopt an "implied consent" statute in which recording a property deed comprises consent to search of one's property when the police have probable cause to believe the owner has been involved in a crime. It takes very little imagination to see how this new doctrine could eat its way through all of our constitutional rights.
>
> Brar, supra, par. 84.

If the implied consent scheme at question here is upheld, then it is not difficult to see that a state could enact laws deeming virtually any conduct as binding (albeit fictitious) consent to a waiver of the right to refuse to consent to a search. If the lead opinion is correct in this case, we must ask, why not? A state could, for example, enact a statute mandating that entry into an establishment that sells alcoholic beverages, attendance at a sporting event, or a stroll in a public park could be deemed consent to a breath or blood test. If a

state could do those things, a state could also define areas as "high crime" and mandate that any person walking in the area has consented to a search of his or her person or effects.

These and other more disturbing examples may be speculative, and the likelihood of such occurrences can be debated. However, no speculation is necessary to see a frightening example of state overreach based on "deemed" consent. Indeed, this Court need only look at a different subsection of the Wisconsin implied consent statute which permits a warrantless blood draw of an unconscious person, with no actual suspicion of impairment.

Wis. Stat. § 343.305(3)(ar)2 states (emphasis added):

> If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that ***the person violated any state or local traffic law***, the officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. ***A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).***

This subsection of the Wisconsin implied consent statute is triggered if there is an accident resulting in death or great bodily harm to any person. A law enforcement officer need only have reason to believe that the subject has violated any state or local traffic law for the statute to be triggered. The violation need not even be a moving violation. It is enough that the subject drove with a faulty taillight or expired registration. In that event, with not even a scintilla of evidence that the driver committed a moving violation, was at fault for the accident, or was impaired in any way, the police may draw blood from an unconscious subject (whose consent is implied, or whose waiver of constitutional protection is statutorily deemed). Under Respondent's doctrine, the police may seize blood from an unconscious person under such circumstances as a categorical exception to the warrant requirement, even when there is no probable cause for the issuance of a warrant.

Since Wisconsin has already jettisoned the probable cause requirement for any search pursuant to the "deemed" consent doctrine, we can now see that Justice Kelly's warning actually understated the danger to the edifice of constitutional rights. If legislatively-created exceptions to the warrant process are approved here, there is no workable test that could be fashioned to prevent more exceptions from being created by zealous politicians who often respond to the needs of special interest groups. Just as it takes little imagination to

see a home search based on living in a certain neighborhood, we can see other areas where this pernicious doctrine would metastasize. The right to be free of unreasonable search or seizure is not the only right at risk. Easy extensions of the doctrine would be "deemed" consent to forfeiture of property in the event of, e.g., a drug arrest, or the institution of suspicionless stop and frisks in high crime areas based on more presence alone.

None of these examples are the least bit farfetched. All of them are based on existing pressure from various interest groups that lobby legislative bodies. There is no way to erect cohesive limitations on the ill-conceived doctrine of "deemed" consent to the waiver of constitutional rights. Rather, we should see the "implied consent" laws for what they really are: laws that simply impose permissible administrative penalties for refusal, but do not provide a mandatory waiver of Fourth Amendment protections in favor of the State that allow the police to bypass the warrant requirement.

II. Over Forty-Five States Have Instituted E-Warrant Procedures Allowing Electronic Warrants To Be Completed In Minutes. If Actual Consent Cannot Be Gained, Legislated Consent Is Unnecessary Because The Warrant Process Works Efficiently.

a. The Availability Of An Electronic Warrant Process Is Relevant To Determining Whether A Per Se Rule Is Overbroad.

Supreme Court cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In Riley v. California, 134 S.Ct. 2473, 2493, 189 L.Ed.2d 430 (2014) the court noted that recent technological advances have made the process of obtaining a warrant itself more efficient, thus reducing the number of incidents where lack of obtaining a warrant can be constitutionally excused.

In Missouri v. McNeely this court stated that:

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment **mandates** that they do so. Missouri v. McNeely, 569 U.S. 141, 152, 133 S.Ct. 1552, 1561, 185 L.Ed.2d 696 (2013) (emphasis added).

The Court in *McNeely* noted that the use of electronic warrant process (or "e-Warrants") was prevalent, and it determined that the need to create additional exceptions to the Fourth Amendment warrant requirement was unnecessary:

> Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.
>
> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. * * * But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.
>
> Missouri v. McNeely, 569 U.S. 141, 154-55, 133 S.Ct. 1552, 1562-63, 185 L.Ed.2d 696 (2013) (footnotes omitted).

b. The Electronic Warrant Process Is Now Available In Virtually Every State, Rendering This Legislatively Created Per Se Rule Overbroad.

Since McNeely was decided in 2013, the number of states that now include language (either in legislation or in court rules) allowing the issuance of warrants based on telephonic, video, or electronic affidavits has grown from a simple majority to at least forty-five. *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants* Justice Management Institute, Executive Summary p. ii (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019). Although Delaware, Connecticut, Massachusetts, Mississippi, Rhode Island, and West Virginia have no legislation or court rule/order governing eWarrants, the lack thereof does not necessarily mean that eWarrants are not permissible, just that there is no explicit reference to the use of electronic means for transmission. The statute in the State of Delaware, for example, simply states that a warrant application must be in writing and signed, but does not specify requirements for the transmission or return of warrants.

In response to this Court's ruling in Birchfield v. North Dakota, upholding the warrant requirement for blood-alcohol testing, Arkansas judges and police began using electronic warrants. Four iPads were given to judges in Washington County, Arkansas. "What really sparked action," District Judge Casey Jones said, "was the U.S. Supreme Court ruling in June 2016 on

the Birchfield v. North Dakota case." *Washington County Search Warrants Catch Up With Digital Age*, Arkansas Democratic Gazette, July 31, 2017 https://www.arkansasonline.com/news/2017/jul/31/washington-county-search-warrants-catch/. This report noted that Jones took testimony over the phone and signed the warrant electronically, shortening an hours-long process to less than 30 minutes. "With the availability of technology, lengthy and time-consuming processes for obtaining search warrants are becoming an anachronism." *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 3* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

The time between applying for a warrant and receiving judicial approval has dropped from 30-60 minutes for paper warrants, to seconds or minutes. A January 14, 2018 article in the Salt Lake Tribune reviewed all 8,400 warrants issued in a 12-month period starting April 2016. One warrant to search was issued in 38 seconds from the time it was electronically requested. Another was issued in 48 seconds. Over one-half were issued in less than 10 minutes. Approximately twenty-five percent of the warrant applications involved DUI cases. But roughly two percent of warrant applications were denied. https://www.sltrib.com/news/2018/01/14/warrants-approved-in-just-minutes-are-utah-judges-really-reading-them-before-signing-off/ (last accessed February 9, 2019). Put another way, if a

legislative consent statute had been put into place in Utah excusing the warrant process, approximately 150 persons that were previously protected under the Fourth Amendment might have been subjected to an otherwise illegal search.

c. The Use Of The Electronic Warrant Process Will Increase The Conviction Rate.

Where e-warrant processes have been instituted, it is reported that DUI conviction rates have increased:

> "In my jurisdiction, we have a 95% conviction rate in DUI cases, in part because defense attorneys are now advising that people submit to the breathalyzer test rather than face a search warrant for a blood draw."—Warren Diepraam, District Attorney, Waller County, Texas, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 2* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

The use of e-warrants has also reduced the time to perform certain functions associated with a DUI arrest and has increased the efficiency of police officers:

> "Processing a DUI arrest can be time consuming, taking the officer off of the street. eWarrants that can be completed in patrol cars allow the officer to obtain search warrants quickly, often within a few minutes, and reduce the time required to complete

the arrest." – Chief Steven Casstevens, Buffalo Grove, Illinois Police Department, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 2* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

"In Minnesota, with paper warrants, the error rate on DWI forms was approximately 30%, but with eDWI processing, that rate has now dropped to almost 0%."—Kent Therkelsen, Product Manager, Bureau of Criminal Apprehension, St. Paul, Minnesota, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 2* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

d. Law Enforcement Supports The Use Of The Electronic Warrant Process.

In November 2018, the International Association of Chiefs of Police passed a resolution praising the successes of the e-warrant process in DUI cases. It reads in pertinent part:

WHEREAS, the establishment and implementation of electronic warrant (eWarrant) programs to compel blood draws or samples of other bodily fluids have proven timely and successful in several

jurisdictions (Responsibility.org, A Guide to Implementing Electronic Warrants, 2018), utilizing a variety of systems, from simple PDF documents to web-based systems to quickly and accurately obtain evidence in the violent crime of impaired driving, and

WHEREAS, in recognition of the technology available to law enforcement agencies across the country, Responsibility.org's study and collaboration with the Justice Management Institute clearly identifies a spectrum of eWarrant systems that can assist jurisdictions in their fight against impaired driving; including recommended legislative framework, planning and design, partner engagement, funding, policy and operations, and metrics to assess goals, and

RESOLVED, that the IACP supports the development, implementation, and legislative engagement of eWarrant systems by law enforcement agencies and prosecutors to prevent injury and death on our nation's roadways.

https://www.theiacp.org/sites/default/files/View%20the%20recently%20adopted%202018%20Resolutions.pdf?utm_source=Informz&utm_medium=email&utm_campaign=Informz%20Email (last accessed February 9, 2019).

In Arizona, the pilot program started in 2012 for e-warrants was so successful that in July 2018 state leaders announced that the program will be expanded statewide. "Within eight minutes to ten minutes here's the search warrant electronically," said Alberto Gutier, the director of The Governor's Office of Highway

Safety. *"Instant search warrants coming for Arizona police departments as soon as August"* ABC15 Arizona July 23, 2018 https://www.abc15.com/news/ roads/ instant-search-warrants-coming-for-arizona-police-departments-as-soon-as-august (last accessed February 9, 2019).

To summarize, the need to circumvent the warrant process by legislatively-deemed consent is non-existent. The use of the eWarrant process is prevalent throughout the United States and this fact alone establishes that legislatively-created, wholesale exceptions to the warrant process are unnecessary and therefore unconstitutional.

III. Two Hundred Years Of Supreme Court Precedence Weigh Against The Concept Of Diluting An Individual's Constitutional Rights Through Legislative Enactments. Many States Have Already Rejected The Idea Of Implied Consent As A Substitute For Actual Consent. No Just Basis Exists To Depart From Settled Precedent In This Matter.

a. Any Statute In Conflict With The Constitution Is A Nullity.

It is the law of the land that any statute in conflict with the Constitution is a nullity. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824). A state legislature does not have the power to pass a law that declares certain facts to be true such that they would operate to negate a person's individual rights arising under the

U.S. Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803).

When a court says that 'consent' implied by law is just as constitutionally effective as express consent, then the court says something terribly chilling. It is saying the legislature may decide when the People of Wisconsin must surrender their constitutional rights. State v. Brar, 898 N.W.2d 499, 521 (Wis. 2017) (Kelly, J., concurring).

Recently, this Court had occasion to review the history of the Fourth Amendment's protections in Carpenter v. United States, ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507, 86 U.S.L.W. 4491 (2018). Citing to Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886) they said "First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.'" Id. 138 S.Ct. at 2214.

The citation to Boyd v. United States is meaningful within the context of this case for a couple of reasons. First, the case was decided in 1886. Petitioners and Amicus are not raising new and novel issues. The rule that a statute cannot infringe upon basic Constitutional protections has been around a while. Second, in Boyd, the Defendants challenged the constitutionality of an act of Congress that compelled them to produce a certain invoice to be used by the district attorney to prosecute them for fraud. The Court held the Act unconstitutional and reversed the Defendant's convictions.

Later, in Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), the Court considered the constitutionality of an Illinois statute that allowed the search of any person located on the premises that was subject to a valid search warrant. The Court held the statute unconstitutional.

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v. New York, 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968). Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See Rakas v. Illinois, 439 U.S. 128, 138-43, 148-49, 99 S.Ct. 421, 427-30, 433, 58 L.Ed.2d 387 (1978); Katz v. United States, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

In footnote 11 the Court went on to say:

> The statute purports instead to authorize the police in some circumstances to make searches and seizures without probable cause and without search warrants. This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches. See, e. g., Torres v. Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1; Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596; Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917; Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040.

The Wisconsin statute in question suffers from the same constitutional infirmities as does the Act of Congress in Boyd and the state statute in Ybarra. With a broad stroke of the pen, the Wisconsin legislature has created a per se exception to the Fourth Amendment. They have legislatively allowed the exception to eviscerate the rule. By legislating blanket consent as provided by all who drive their vehicles on the roads of Wisconsin, the State has effectively said the Fourth Amendment does not apply. This cannot be right.

The traditional inquiries made to determine if an individual's consent is voluntary have been dispensed with through the statutory implied consent scheme. According to Professor LaFave, "Consent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his

privacy is contemplated if he does a certain thing, and (b) proceeds to do that thing." 4 Wayne R. LaFave et al., Search & Seizure: A Treatise on the Fourth Amendment, s.8.2(l) at 164-65 (5th ed. 2012).

For "consent" implied by law, we ask whether the driver drove his car. And that's it. If the court is right about "consent" implied by law, then we have no interest in what the driver said, thought, experienced, felt, or saw. Nor do we need consider whether the driver acquiesced to a police officer's claim of lawful authority. We aren't interested in any personal detail about the driver, such as his age, intelligence, circumstances, or emotional state. The only thing we want to know is whether he was in the driver's seat. And that's exactly what the decision below said: "We conclude that Brar voluntarily, albeit impliedly, consented when he chose to drive on Wisconsin roads."

That single sentence comprises the entirety of the court's voluntariness analysis as it relates to "consent" implied by law. In truth, that's about as much as it could possibly have said because we really aren't interested in the driver at all when it comes to this type of consent. The driver is irrelevant to the question because he isn't the one who provided the consent—it was the legislature. As long as the driver drove, the consent inquiry ends before it begins, because the legislature provided it 48 years ago when it adopted Wis. Stat. § 343.305. There is a vast chasm separating express consent from "consent" implied by law, as this brief diversion into the voluntariness standard illustrates. In reality, they have literally nothing in

common. Which is understandable because, as discussed above, they perform entirely different functions.

State v. Brar, 898 N.W.2d 499 at 516-17 (2017) (Kelly, J., concurring).

As one can see the net effect of the implied consent law is to create a per se exception to the constitutionally required warrant requirement. This Court has rejected per se exceptions in the context of exigent circumstances in favor of using the time-honored totality of the circumstances test. Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

b. Many State Courts Have Already Rejected The Idea Of Legislatively-Created Consent.

The following state courts have held the simple act of driving cannot substitute for actual consent; thus unconstitutional. State v. Havatone, 389 P.3d 1251 (Ariz. 2017) (concluding that the unconscious clause can be constitutionally applied only when case-specific exigent circumstances prevent law enforcement from getting a warrant); State v. Butler, 302 P.3d 609, 613 (Ariz. 2013) (establishing that absent an exception to the warrant requirement, nonconsensual, warrantless blood draws from DUI suspects are unconstitutional); People v. Arredondo, 199 Cal. Rptr. 3d 563 (Cal. Ct. App. 2016), review granted and opinion superseded, 371 P.3d 240 (Cal. 2016); People v. Ling, 222 Cal. Rptr. 3d 463, 15 Cal. App. 5th Supp. 1 (2017); Williams v. State,

771 S.E.2d 373 (Ga. 2015) (mere compliance with statutory implied consent for blood draw for DUI suspect did not, per se, equate to actual, and therefore voluntary, consent); Bailey v. State, 790 S.E.2d 98, 104 (Ga.App. 2016) (blood draw from unconscious driver based on statute that provides the driver to have deemed not to have withdrawn his otherwise deemed consent by driving held unconstitutional), overruled on other grounds by Welbon v. State, 799 S.E.2d 793 (Ga. 2017); State v. Romano, 800 S.E.2d 644 (N.C. 2017); State v. Villarreal, 475 S.W.3d 784 (Tex. Crim. App. 2014); State v. Ruiz, 545 S.W.3d 687 (Tex.App. 2018) review granted (April 25, 2018); State v. Ryce, 396 P.3d 711 (Kan. 2017); Commonwealth v. Myers, 164 A.3d 1162 (Pa. 2017); ("Treating subsection 20-16.2(b) as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances."); State v. Henry, 539 S.W.3d 223, 236 (Tenn. Crim. App. 2017) ("Given the Court's reasoning in Birchfield, we can confidently conclude that Henry's warrantless blood draw pursuant to the mandatory blood draw section of the statute was not justified based on his legally implied consent."); Dortch v. State, 544 S.W.3d 518, 528 (Ark. 2018) (implied consent law held unconstitutional, holding: "While we agree that the criminal penalty imposed pursuant to Arkansas's refusal-to-consent law is much less severe than the penalties at issue in Birchfield, the plain language utilized in our statutes demonstrates that these are nonetheless criminal penalties."); State v. Fierro, 853

N.W.2d 235, 243 (S.D. 2014) (implied consent statute did not provide an exception to the search warrant requirement as relates to conscious driver); State v. Medicine, 865 N.W.2d 492, 495-500 (S.D. 2015) (statute cannot substitute for actual consent; totality of the circumstances did not show defendant freely and voluntarily consented to blood draw); State v. Won, 372 P.3d 1065, 1083-84 (Haw. 2015) (driver's consent to breath test after implied consent advisory was not voluntary); State v. Wulff, 337 P.3d 575, 581 (Idaho 2014) (concluding that "irrevocable implied consent operat[ing] as a per se rule . . . cannot fit under the consent exception because it does not always analyze the voluntariness of that consent"); Flonnory v. State, 109 A.3d 1060, 1065-66 (Del. 2015) (trial court required to perform totality of the circumstances analysis to determine if defendant voluntarily consented to the blood draw); State v. Pettijohn, 899 N.W.2d 1, 29 (Iowa 2017) (implied consent statute cannot automatically constitute effective consent to breath test under state constitution); State v. Modlin, 867 N.W.2d 609, 619 (Neb. 2015) (whether consent to search was voluntary is to be determined from the totality of the circumstances surrounding the giving of the consent); Byars v. State, 336 P.3d 939, 945-46 (Nev. 2014) (holding unconstitutional a statute that provided for use of reasonable force to take blood and that made implied consent irrevocable); State v. Baird, 386 P.3d 239, 241-42 (Wash. 2016) (implied consent statute does not authorize a search, it authorizes a choice between consenting or refusing knowing the sanctions).

The overwhelming majority of state decisions which have considered the same or a similar question as the one before this Court have held fast to the constitutional principles advanced by amicus here and rejected the use of implied consent as a synonym for voluntary consent.

c. In Conclusion, Deemed Or Implied Consent Is Not Actual Consent, Nor Should It Be.

Recalling the words of Mr. Justice Bradley:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1874).

In Schneckloth, this Court rejected the per se requirement that every voluntary consent to a search be accompanied with knowledge that the subject had the

right to refuse the search. The Court said, "In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'" Schneckloth v. Bustamonte, 412 U.S. 218, 229, 93 S.Ct. 2041, 2049, 36 L.Ed.2d 854 (1973). If a state legislature is allowed to alter over two-hundred years of constitutional protections on this issue, one can only wonder where we go from here. Justice Kelly said it best in his concurring opinion in State v. Brar, 898 N.W.2d 521-22 (Wis. 2017):

> Today the court says the legislature properly suspended Wisconsinites' Fourth Amendment rights when they go for a drive. What of their Sixth Amendment rights? Perhaps the legislature might decide it would be easier to get convictions if they also suspend the right to the effective assistance of counsel. According to our opinion today, the legislature could simply declare that driving in Wisconsin waives that right, too. Or the right not to incriminate oneself. Or the right to a jury. What principle, exactly, would prevent any of this?
>
> Nor is there anything about this new doctrine that necessarily limits it to the context of obtaining blood tests from intoxicated drivers. There are certain parts of the State that experience a disproportionate amount of crime. Perhaps the legislature might decide police need greater access to homes and other buildings in such areas. It could, according to our opinion today, adopt an "implied consent" statute in which recording a property deed comprises consent to a search of one's

property when the police have probable cause to believe the owner has been involved in a crime. It takes very little imagination to see how this new doctrine could eat its way through all of our constitutional rights.

I understand the importance of pursuing intoxicated drivers. But we are deforming our Constitution. By conferring on the legislature the authority to create consent where none exists, we are reducing constitutional rights to matters of legislative grace.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of the State of Wisconsin.

No legislature has the power to take away constitutional rights granted in the Constitution and interpreted by the United States Supreme Court. Based on the above, we request this Court grant the relief requested by the Petitioner and hold the Wisconsin Implied Consent law unconstitutional to the extent that

it allows the taking of the driver's blood without actual consent assuming there are no other exceptions to the warrant requirement that apply.

Respectfully submitted,

DONALD J. RAMSELL*
Counsel for National College for DUI Defense Inc.
RAMSELL & ASSOCIATES LLC
128 S. County Farm Road
Wheaton, IL 60187
(630) 665-8780
Donald.Ramsell@dialdui.com

MICHELLE BEHAN
Counsel for National College for DUI Defense Inc.
BEHAN RAMSELL PLLC
945 N. Stone Avenue
Tucson, AZ 85718
(520) 220-5047
Michelle.Behan@MissDUIArizona.com

FLEMING KANAN WHITED, III
WHITED LAW FIRM
150 S. Palmetto Avenue
Suite 102
Daytona Beach, FL 32114
(386) 253-7865
fkwiii@aol.com

ANDREW MISHLOVE
MISHLOVE & STUCKERT
4425 N. Port Washington Road, #110
Milwaukee, WI 53212
(414) 332-3499
Andrew@Mishloveand Stuckert.com

Counsel of Record